such a theory satisfactorily explain the cases? It is well settled that if the office that the assumed officer purports to occupy was created by an unconstitutional statute, and hence does not exist in contemplation of law, all the acts of the assumed officer are open to collateral attack.[12] Again, the law is that if the assumed officer does not hold under "color of title" his acts are not valid even with regard to innocent third parties that have had no notice of his want of authority.[13] If, as the New York court contends, the *de facto* doctrine legalizes unlawful acts for the benefit of innocent third parties, here are two arbitrary limitations that bear no relation to the knowledge of the third parties. No reasons of fairness between the parties can justify such distinctions.

But the language of the majority of American courts seems to show that they have adopted a more liberal view of the *de facto* doctrine. However an office is defined,[14] all will agree that an officer is an individual to whose acts the law attaches special consequences because of the office that he occupies. Conversely it may be argued that when the law attaches similar consequences to the acts of another individual, it is also proper to call him an "officer." There are thus two kinds of officers, both in a primary sense "lawful," for both are recognized by law. The one kind, duly elected, have many rights, as well as powers and duties; the other kind, becoming officers by their own acts, acquire no rights themselves: no right to remain in office;[15] no right to salary;[16] and no right to do anything that a private individual cannot do.[17] But they do acquire the power to change the rights of others: the power to pass titles to others; the power to make contracts; and now generally the power to elect other officers. They acquire these powers because they have become officers by occupying the office. Hence if no office has been created because of the unconstitutionality of a statute they cannot acquire these powers. Neither can they become officers unless they occupy the office under "color of title" just as a disseisor of land must occupy under claim of right. "Color of title" thus distinguishes true officers, both *de jure* and *de facto*, from mere usurpers.

REMOVAL FOR PUBLIC HEALTH OF DAMS BY POLICE POWER OR EMINENT DOMAIN. — The taking of property by eminent domain for a public use is often almost indistinguishable[1] from such deprivations as are merely results of those regulations under the police power for the protection of public health, safety, or morals which are not burdened with a constitutional requirement of compensation.[2] This is especially true, since a

[12] Norton *v.* Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121.

[13] Norfleet *v.* Staton, *supra*.

[14] An office has been variously defined as a "right," a "charge," a "permanent trust," an "agency." See 2 BL. COMM. 36; United States *v.* Maurice, 2 Brock. (U. S.) 96, 102; Matter of Hathaway, 71 N. Y. 238; Chark *v.* Stanley, 66 N. C. 59.

[15] In *quo warranto* proceedings a judgment of *ouster* would be pronounced against a *de facto* officer. *In re* Delgardo, 140 U. S. 586, 11 Sup. Ct. 874.

[16] See 24 HARV. L. REV. 658.

[17] People *ex rel.* Sullivan *v.* Weber, 86 Ill. 283.

[1] See 25 HARV. L. REV. 389.

[2] Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. 273.

special subject of police regulation, like the public health, may also be the object of an exercise of eminent domain.[3] It is clear that, without compensation, property may no more be taken for actual use in the name of public health than for other public purposes.[4] Thus compensation is required for a building taken for use as a hospital,[5] but not for one destroyed to protect public health;[6] for constructing a permanent dike[7] or drain[8] on a dry lot to prevent the unhealthy flooding of other land, but not for digging a drain in the swampy land,[9] or filling in at the expense of the owner.[10]

The test is not whether there is a taking or merely an impairing or destroying, for property may be taken in the proper exercise of the police power,[11] while destruction of one *res*, incidental to the public use of another, would seem to require eminent domain.[12] The distinction most commonly accepted rests upon whether the particular property is affected because of its utility in promoting a projected public use, or because of its participation in causing the public detriment which is regulated or removed.[13]

In a recent case a statute declaring that a mill-privilege which remained useless without repair for five years should cease, as against the public health, convenience, and welfare, and that commissioners for those purposes might without compensation remove the dam and clean out the watercourse, was held to authorize taking private property for public use without compensation, in violation of the state constitution.[14] *Kiser* v. *Board of Commissioners of Logan County*, 97 N. E. 52 (Oh.). It seems that the police power may be properly exercised to remove unhealthy conditions by cleaning out a non-navigable stream,[15] or by compelling a railroad to modify the opening of its bridge to permit the enlargement of a drain,[16] or to compel the owner of a dam to construct a fishway at

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[3] Sweet *v.* Rechel, 159 U. S. 380, 16 Sup. Ct. 43; Matter of Ryers, 72 N. Y. 1. See 1 LEWIS, EMINENT DOMAIN, § 307.

[4] See Chicago, etc. Ry. Co. *v.* People *ex rel.* Drainage Commissioners, 200 U. S. 561, 592, 26 Sup. Ct. 341, 350; FREUND, POLICE POWER, § 511.

[5] See Spring *v.* Inhabitants of Hyde Park, 137 Mass. 554, 559.

[6] Theilan *v.* Porter, 14 Lea (Tenn.) 622; Ferguson *v.* City of Selma, 43 Ala. 398.

[7] Matter of Cheesebrough, 78 N. Y. 232.

[8] Cavanagh *v.* City of Boston, 139 Mass. 426, 1 N. E. 834. But *cf.* Commonwealth *v.* Tewksbury, 11 Met. (Mass.) 55.

[9] Donnelly *v.* Decker, 58 Wis. 461, 17 N. W. 389; Griffith *v.* Pence, 9 Kan. App. 253, 59 Pac. 677.

[10] Bliss *v.* Kraus, 16 Oh. St. 54; Bancroft *v.* City of Cambridge, 126 Mass. 438.

[11] Commonwealth *v.* Carter, 132 Mass. 12. See 3 HARV. L. REV. 189, 195, note.

[12] As where a railroad tears down a building in order to use its site belonging to a different owner. *Cf.* Kersey *v.* Schuylkill River, etc. R. Co., 133 Pa. St. 234, 19 Atl. 553.

[13] See Philadelphia *v.* Scott, 81 Pa. St. 80, 85; FREUND, POLICE POWER, § 511; RANDOLPH, EMINENT DOMAIN, § 23.

[14] The facts of the case are not reported. The result may be supported on the ground that this particular act is not sufficiently express in limiting the authority to cases of detriment to public health or safety. But although the court does not cite authorities or apparently recognize the difficulty here discussed, its language is broad enough to deny the power of the state to remove dams without compensation under the police power.

[15] Brown *v.* Keener, 74 N. C. 714.

[16] Chicago, etc. Ry. Co. *v.* People *ex rel.* Drainage Commissioners, *supra.*

his own expense.[17] The case where the public health requires the complete removal of the dam is probably the closest that could be stated. By the test already suggested, it would apparently fall under the police power, but it has been declared, by way of *dictum*, to be eminent domain, requiring compensation.[18] There is, however, an essential difficulty in saying that any property is taken to be used for the public.[19] Rather a stream is restored to its natural state by removing an obstruction producing unhealthy conditions.

The destruction of property where necessary in the public interest is familiar to the police power,[20] but rare under eminent domain.[21] Assuming that it cannot be done, under authority only to abate nuisances, unless the conditions can be adjudged to constitute a nuisance according to common law,[22] yet apparently the police power is adequate for appropriately authorizing the removal of a detriment to public health not within the common-law definition of a nuisance.[23] Conceding that justice and good faith would oblige the legislature to compensate the owner of such a dam, especially if its original erection was authorized or consideration exacted in return,[24] yet, if the constitution recognizes this obligation as a legal requirement only in cases of taking for public use, it should not be for the court to strain its terms in order to overthrow a statute justified by the police power.[25]

CORPORATION'S RIGHT TO AVOID TRANSACTIONS WITH DIRECTORS. — The determination of a corporation's right to avoid transactions in which any of its directors are adversely interested, and which have not been ratified by the shareholders, raises problems somewhat similar to those presented in the analogous situation of transactions between an ordinary principal and his agent.[1] It is established doctrine that in the latter case

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[17] State *v.* Beardsley, 108 Ia. 396, 79 N. W. 138; Parker *v.* People, 111 Ill. 581. *Contra*, Woolever *v.* Stewart, 36 Oh. St. 146.

[18] See Miller *v.* Craig, 11 N. J. Eq. 175, 186; Talbot *v.* Hudson, 16 Gray (Mass.) 417, 427. In the latter case the object was to drain meadows in promotion of agriculture.

[19] See Livingston *v.* Ellis County, 30 Tex. Civ. App. 19, 21, 68 S. W. 723, 724.

[20] Gardner *v.* Michigan, 199 U. S. 325, 26 Sup. Ct. 106; Newark, etc. Ry. Co. *v.* Hunt, 50 N. J. L. 308, 12 Atl. 697. See Russell *v.* Mayor, etc. of New York, 2 Den. (N. Y.) 461.

[21] Merely the amount or value of the property which it is necessary to take should not turn the case into one of eminent domain.

[22] People *ex rel.* Copcutt *v.* Board of Health, 140 N. Y. 1, 35 N. E. 320; Yates *v.* Milwaukee, 10 Wall. (U. S.) 497.

[23] See Miller *v.* Craig, *supra*, 185; Train *v.* Boston Disinfecting Co., 144 Mass. 523, 530, 11 N. E. 929, 936; TIEDEMAN, LIMITATIONS OF POLICE POWER, § 122. *Cf.* Rideout *v.* Knox, 148 Mass. 368, 19 N. E. 390.

[24] See Stone *v.* Mississippi, 101 U. S. 814.

[25] So a city may cause the removal of a powder magazine despite having formerly sold the land for its location. Davenport & Morris *v.* Richmond City, 81 Va. 636. *Cf.* Dunham *v.* City of New Britain, 55 Conn. 378, 11 Atl. 354.

[1] A peculiar problem is presented by contracts of corporations to vary the duties imposed upon their directors, not by contract, but by the relation of directorship. Such contracts may be obnoxious for some reason of policy not applicable to all contracts